BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI.

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(1)

There is neither the specific complaint of wrongdoing; nor the showing of probable cause, nor the kind or quality of proof thereof which the constitution makes imperative to warrant the search and examination of the individual's accounts; especially, in view of the fact that the parties whose bank records are sought to be examined are not made parties defendant to this action or any other action. Fed. Trade Commission v. American Tobacco Co., 264 U. S. 298. Veeder v.U. S., 252 Fed. 418. Hale v. Henkel, 201 U. S. 43. Boyd v. U. S., 116 U. S. 616. Silverthorne Lbr. Co. v. U. S., 251 U. S. 385. Harriman v. Interstate Commerce Commission, 211 U. S. 407.

In considering the question of law involved in this case it must be borne in mind that the Office of Price Administration has not started either a criminal or civil action against the four named depositors of the Shawano National Bank whose accounts they want to examine. It will be noted that the only allegation made in the application to secure the court order to investigate said accounts is that an investigation is being conducted. Obviously, there being no showing of probable cause, the request is made on the basis of suspicion and in the truest sense is nothing other than a "fishing expedition".

In the case of the *Federal Trade Commission* v. *American Tobacco Company*, 264 U. S. 298, it was held that the pro-

vision giving the Commission the right of access to documents of a corporation being investigated does not authorize a "fishing expedition" but particular documents must be called for, and reasonable ground to believe that they contain material evidence must appear, before a court will compel their production. In the case at bar, there is not a single showing of a reasonable ground to believe that material evidence would be forthcoming.

In the *Federal Commission* case, *supra*, Justice Holmes states as follows:

> "It is contrary to the first principles of justice to allow a search through all of the respondent's records, relevant or irrelevant, in the hope that something will turn up. The unwillingness of this court to sustain such a claim is shown in *Harriman* v. *Interstate Commerce Commission*, 211 U. S. 407, and as to correspondence even in the case of a common carrier in *U. S.* v. *Louisville N. R. Co.*, 236 U. S. 318."

Further on in the opinion, it is stated:

> "The investigations and complaints seem to have been only on hearsay or suspicion; but even if they were induced by substantial evidence under oath the rudimentary principles of justice that we have laid down would apply. We cannot attribute to Congress an intent to defy the Fourth Amendment, or even to come so near doing so as to raise a serious question of constitutional law."

In considering this matter, we must always be mindful of the Fourth Amendment to the Federal Constitution which provides as follows:

> "The right of the people to secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no warrant shall issue, but upon probable cause, supported

by oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized."

The above referred to quotation from the Bill of Rights has been cited in innumerable cases and the law in the state of Wisconsin and the United States is very definite and clear that no search is ever warranted upon SUSPICION; that it is absolutely necessary that the search be made upon PROBABLE CAUSE.

In the state of Wisconsin, our leading case on Bills of Discovery is that of *Cespuglio* v. *Cespuglio*, 238 Wis. 603 (1941), and on page 606 we find the following quotation:

> "It is held in *Worthington P. & M. Corp.* v. *Northwestern I. Co.*, 176 Wis. 35, 186 N. W. 156, that a general allegation of materiality and necessity is insufficient and that there must be facts set forth showing how and why discovery is material; also, in *Frank* v. *Marquette University*, 209 Wis. 372, 245 N. W. 125, which quotes with approval the opinion in the *Worthington* Case. In *Northern Wis. Co-op Tobacco Pool* v. *Oleson*, 191 Wis. 586, 593, 211 N. W. 923, this court said:
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> > "'Neither section authorizes the indiscriminate exploration into matters extrinsic to the merits of the pending action. Of course it can be readily understood that to give a roving commission for the inspection or production of books or papers in order that a party may ransack them without limitation, either as to time or manner, would present an intolerable condition.'"

In the case of *Worthington P. & M. Co.* v. *Northwestern I. Co.*, 176 Wis. 35, on page 41 the court held as follows:

> "An order for production or inspection will be denied where the application appears to be made solely for fishing purposes."

In this connection, it must be noted that a corporation is entitled to invoke the guarantys of the Fourth Amendment against unreasonable searches and seizures in as full a measure and to the same extent as any natural person. *Silverthorne* v. *U. S.*, 251 U. S. 385.

(2)

By authority of the National Banking Act, the records of The Shawano National Bank are not subject to the inspection of the Office of Price Administration according to the showing made and the lack of Congressional authority given to the Office of Price Administration, which does not specifically express a congressional intention that said Office of Price Administration has visitorial powers over national banks. First National Bank v. California, 262 U. S. 366. Silverthorne Lbr. Co., 251 U. S. 385. Consolidated Rendering Co. v. Vermont, 207 U. S. 541.

The proposed investigation of the Office of Price Administration is predicated upon the authority to issue subpoenas; said Sections 202 (a), (b), (c) and (e) were incorporated in the opinion of the Circuit Court of Appeals (R. 22-26).

After considering the recitation of authority on the part of the Office of Price Administration, let us now look to the law applicable to banks relative to visitation.

> 12 U. S. C. 484. LIMITATION ON VISITORIAL POWERS. No bank shall be subject to any visitorial powers other than such as are authorized by law, or vested in the courts of justice or such as shall be or shall have been exercised or directed by Congress or of either House duly authorized. (R. S. Sec. 5240;

Feb. 19, 1875, c. 89, 18 Stat. 329; Dec. 23, 1913, c. 6, Sec. 21, 38 Stat. 271.)

Nowhere does one find in the Act creating the Office of Price Administration, and particularly the above referred to Sections any authority to supersede other Federal regulations. The measure of power is the mode prescribed in the Statute. *Head* v. *Providence Ins. Co.*, 2 Cranch (U. S.) 127, 156, 2 L. ed. 229, 238.

Again referring to the *Federal Trade Comm.* v. *American Tobacco Co., supra*, the opinion indicates that nothing short of the most explicit language will induce the court to attribute to Congress the intent to authorize "fishing expeditions" into private papers, on the possibility that they may disclose evidence of crime, in view of the provisions of the Constitution against unreasonable searches and seizures.

In looking over some of these instances where Congress has specifically authorized use of bank information, we note that the Act itself specifically sets them out as in the following cases:

Federal Farm Loan Act: The Comptroller is "authorized and directed" to furnish his information concerning national banks and to make special examinations for the "confidential use" of any Federal Intermediate Credit Bank. 42 Stat. 1458, 12 U. S. C. A. 1091, 4 F. C. A. Tit. 12, sec. 1091.

Similarly: Reconstruction Finance Corporation Act. 47 Stat. 709, 714, 15 U. S. C. A. 608, 4 F. C. A. Tit. 15, sec. 608. Federal Home Loan Bank Act. 47 Stat. 739, 12 U. S. C. A. 1442 (a), 4 F. C. A. Tit. 12, sec. 1442 (a). Federal Deposit Insurance Corporation Act. 49 Stat. 693-694, 12

U. S. C. A. 264 (k) (2-4), 4 F. C. A. Tit. 12, sec. 264 (k) (2-4).

In the light of the foregoing, I now raise the question as to where in the Congressional creation of the Office of Price Administration has any such authority in the investigation of banks been given. It ~~does not~~ having been specifically given to the Office of Price Administration, it is our contention that said office has no authority to exercise visitorial powers over a national bank and more especially on the showing made. Again, we refer to the *Federal Trade Commission* v. *American Tobacco Co., supra,* which calls attention to the necessity of explicit language of Congress.

Having looked at some of the statutes relative to the banking business being conducted on a privileged communication basis, we are justified in asking wherein any part of the law creating the Office of Price Administration has set forth a safeguard as Congress has done in all other instances. It seems logical that if Congres intended the Office of Price Administration to have the right to examine banks, some provisions would have been made relative to handling this information. No court or commission has ever before been granted any such unlimited inquisitorial power as the Office of Price Administration now claims and, certainly, if they had only some part of the power they claim, Congress would have safeguarded banking principles involved. The law is very clear as to the penalties on bank examiners who would divulge any information that they have gained on examinations and the work of the bank examiners is no different from that which an Office of Price Administration representative would have to do in order to carry on this proposed investigation. Accordingly, if

the bank examiner is under the penalty of the law, it seems reasonable that Congress should have placed a penalty for anyone else.

In this connection, it must be remembered that banking records are a continuing record and, in the instant case at bar, an investigation would open up to the one examining the complete records of the bank and should this bank be required to submit all of the records to Green Bay, it would virtually cease to do business until such time as the Office of Price Administration determined it had carried on its investigation in its entirety. Certainly, such was not the intent of Congress.

It will be noted that in Section 202 (b), *supra,* the Act refers specifically to commodities and rent control and that no mention is made of banks and bank records.

(3)

The authority to conduct an examination of bank records such as the Office of Price Administration claims must be most explicit in its language before the Court will attribute to Congress the intent to authorize an investigation into records of this kind. The proposed investigation in the case at bar is nothing short of a "fishing expedition" merely intending to disclose evidence, if there be any, for there was no showing of probable cause and, as such, constitutes an unreasonable usurpation of power. Fed. Trade Commission v. American Tobacco Co., 246 U. S. 298. Hale v. Henkel, 201 U. S. 43. Consolidated Rend. Co. v. Vermont, 207 U. S. 541.

It is our contention that had Congress intended the Office of Price Administration to have the authority to examine banks such provisions in the statute would have been made together with safeguarding statutes which appear in all other forms of banking legislation. Again, we turn to that case of *Federal Trade Commission* v. *American Tobacco Company* to learn that nothing short of the most explicit language would induce a court to attribute to Congress the intent to grant some power by innuendo.

The United States Supreme Court refused to interfere with the action of the Interstate Commerce Commission when that action was challenged by the Administrator of the Office of Price Administration. The case is of little actual significance here but it does offer a guide by comparison.

In *Interstate Commerce Commission* v. *Jersey City*, 322 U. S. 503, 520; 88 L. Ed. 1420, 1431 (1944), the Court stated as follows:

> "But that does not answer the real question, which is the effect of the stabilization legislation. In seeking this answer we are inquiring as to the relative powers and responsibilities of two federal agencies. Congress was free to apportion their functions as it saw fit and to transfer any part of the normal responsibility of the Commission to the Price Administrator or other executive agencies. Commerce Commission authorization of rate increases could have been subject to review or veto so far as any objection of the Commission is concerned.
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> "But Congress did no such thing. * * *"

Respectfully submitted,

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Shawano, Wisconsin
December 12, 1945